PD-0354-21 & PD-0355-21
COURT OF CRIMINAL APPEALS
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Nos. PD-0354-21 & PD-0355-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/15/2021
DEANA WILLIAMSON, CLERK

EDWIN ANTONIO OSORIO-LOPEZ, Appellant

v.

STATE OF TEXAS, Appellee

Appeal from Upshur County, Trial Causes 17,914 & 17,927
Nos. 06-18-00197-CR & 06-18-00198-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

TRIAL (Oct. 2018)

Judge..... **Hon. Lauren Parish**
Presiding Judge, 115th District Court, Upshur County

State..... Upshur County D.A. **Billy Byrd**
405 Titus Street, Gilmer, Texas 75644

Appellant, Edwin Osorio-Lopez ..... **Matthew Patton, III**
316 Titus Street, Gilmer, Texas 75644

RETROSPECTIVE COMPETENCY (Feb. 2020)

Judge..... **Hon. Dean Fowler**
Presiding Judge, 115th District Court, Upshur County

State..... Upshur County A.D.A. **Sarah Cooper**
405 Titus Street, Gilmer, Texas 75644

Appellant (initially represented by) ..... **Matthew Patton, III**
316 Titus Street, Gilmer, Texas 75644

COURT OF APPEALS

State..... Upshur County A.D.A. **Sarah Cooper**
405 Titus Street, Gilmer, Texas 75644

Appellant..... **Jonathan Hyatt**
P.O. Box 7935, Longview, Texas 75607

COURT OF CRIMINAL APPEALS

State..... Asst. State Prosecuting Attorney **Emily Johnson-Liu**
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Appellant..... **Jonathan Hyatt**
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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Texas Constitutional Provisions, Statutes, and Rules

Other citations

Nos. PD-0354-21 & PD-0355-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EDWIN ANTONIO OSORIO-LOPEZ, Appellant

v.

STATE OF TEXAS, Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

There is a special concern about waivers of rights, including counsel, when a trial court is also entertaining doubt about a defendant's present competence. But even if that justifies a general prohibition against self-representation until competence is determined, no such blanket prohibition is justified at a retrospective competency hearing.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

Appellant was convicted of evading with a vehicle and aggravated assault,

and the jury assessed two $10,000 fines and a 10-year and 20-year prison term, respectively.[1] 6 RR 176, 204-05. The court of appeals abated for a retrospective competency hearing. At the hearing, the trial court permitted Appellant to represent himself. Retro-RR at 5-6. When the appeal resumed, he argued this was error. The court of appeals held that defendants in retrospective competency hearings have no right of self-representation, reversed, and remanded for another hearing at which counsel would represent Appellant. *Osorio-Lopez v. State*, Nos. 06-18-00197-CR & 06-18-00198-CR, 2021 WL 1583885, at *1 & 2021 WL 1583890, at *6 (Tex. App.—Texarkana, Apr. 23, 2021).

STATEMENT OF FACTS

Incompetence, hospitalization, and restoration.

In early 2018, Appellant was evaluated—at the prosecutor's request[2]—for competency to stand trial. 3 RR 4, 14. A court-appointed psychologist opined that

[1] Appellant was also initially charged with unauthorized use of a motor vehicle (UUMV) in trial cause 17915, but this case was not joined for trial and was dismissed after the jury convicted Appellant in the other two cases. 17915 (UUMV) CR at 41. The trial court granted Appellant's request to prepare a clerk's record in the UUMV case to supplement the appellate records in the evading and aggravated assault cases. *Id.* at 42-44. It appears to be the only record containing the pre-trial competency documents.

[2] 5 RR 5; Supp. CR 13-14 (trial court's findings on missing record). For simplicity, references are only to the clerk's record in the evading case, trial cause 17914, unless otherwise stated.

Appellant was incompetent. 17915 (UUMV) CR at 23-31. Incompetence was not contested, and Appellant was committed to a state hospital in April 2018 for 120 days or less. *Id*. at 32. Within that time, in August 2018, Appellant was found to be competent.[3] *Id*. at 36-40; 5 RR 5.

The 2018 Trial.

In October 2018, a few days before trial, Appellant's counsel Matthew Patton filed a motion to withdraw. CR at 21; 4 RR 5. The trial court denied the request when, at the hearing on the motion, Appellant only complained about a prior case in another county, not about Patton. 4 RR 11.

On the day trial began, counsel asked for a continuance to have Appellant re-evaluated for competency due to deterioration in his ability to communicate with counsel, irrational thoughts and accusations of things happening at the jail "that would be horrific if true," and his persistent and erroneous belief that Patton had represented him on the prior charge. 6 RR 10-11; CR 24-26. The trial court denied

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[3] The trial court's written finding that Appellant's competence was restored does not appear in the record, but from Appellant's trial counsel's verified motion for continuance prior to trial, it does not appear Appellant's competency restoration was contested. CR at 24; 6 RR 10; TEX. CODE CRIM. PROC. art. 46B.0755(c) (no hearing required if trial participants all agree the defendant is competent following credible evidence that the defendant has been restored to competency). And the trial court's recitation of the events prior to trial states that Appellant "was evaluated, he was treated. He came back, has come back now with a finding that he is competent." 5 RR 5.

the continuance. 6 RR 12. Appellant testified at both phases of trial, and the jury convicted him of both evading and aggravated assault. 6 RR 125, 176, 181.

Initial appeal and feasibility hearing.

On appeal, Appellant argued it was error not to grant a continuance for a competency re-evaluation. *See* App. Original COA brief at 10-12. The court of appeals held there was some evidence to support a finding of incompetency and abated the cases to determine if a retrospective competency hearing was feasible. *See* Aug. 14, 2019 Order, Nos. 06-18-00197-CR & 06-18-00198-CR, Sixth Court of Appeals (available here). At the feasibility hearing, Appellant's trial and appellate counsel were concerned Appellant might not be presently competent and asked that he be re-evaluated. 11-5-2019 RR 7-8; 5th Supp. CR 16-18. The State joined the request and asked that the jail provide Appellant all of his medication. 11-5-2019 RR at 8. The trial court concluded that it was feasible to hold a retrospective competency hearing, but added, "we are going to make sure that [Appellant] is competent before we do that." *Id*. at 9; 3rd Supp. CR 17.

Further Competency Evaluation.

In November and December 2019, the same court-appointed psychologist evaluated Appellant and determined he presently met the competent-to-stand-trial standard, as he had the ability to consult with his attorney with a "reasonable degree

of rational understanding if he so chooses." 5th Supp. CR at 4-7.

Retrospective competency hearing.

At the beginning of the retrospective competency hearing, Patton and the trial court both asked Appellant if he wanted to represent himself, and he indicated he did. Retro-RR at 5-6. The trial court permitted him to do so. The State indicated there was a stipulation[4] that Appellant had been evaluated and found competent to proceed in the retrospective competency hearing and asked the court to take judicial notice of the report, which it did. Retro-RR at 6-7.

No expert testimony or psychological evaluations contemporaneous with the 2018 trial were offered in evidence. Instead, the State called the court interpreter and District Attorney. The interpreter had interpreted for Appellant during pretrial hearings, trial, his competency evaluations, and some discussions with counsel. *Id.* at 8. He believed Appellant understood what was being said but was not always receptive to the information and sometimes "shuts off literally" when he is not interested in what is being said. *Id*. at 8, 10-11.

The District Attorney testified about raising the concern about Appellant's competency back before his mental health commitment. During cross-examination

[4] It is unclear from the record whether the prosecutor's statement "we have agreed to stipulate to the doctor's report" included Patton's agreement or not.

of Appellant at a hearing (for which the transcription was lost), the D.A. observed that Appellant's responses had "absolutely nothing to do with the question asked." *Id*. at 14. When that happened, the attorneys stopped the hearing and agreed to have Appellant evaluated. *Id*. He contrasted this with his experience with Appellant during trial, including his cross-examination, where "there was a clear difference that [Appellant] fully had the ability to understand the proceedings." *Id*. at 15.

Appellant called no witnesses. The trial court found that Appellant had been competent during his 2018 trial. *Id*. at 17; 4th Supp. CR 4-5.

Continuation of Appeal & Rehearing.

After initially affirming the convictions, the court of appeals on motion for rehearing withdrew its original opinion and ultimately ordered further briefing related to the retrospective competency determination. *See* May 5, 2020 order (available here). In his supplemental briefing, Appellant argued, among other issues, that it was error to permit him to represent himself.

In its opinion, the court of appeals agreed but specified that it was "not based on any alleged shortcomings in the trial court's [*Faretta v. California*, 422 U.S. 806 (1975)] admonishments, but . . . on the inapplicability of the right to self-representation in the proceeding below, i.e., one to determine [Appellant's] competency at the trial of conviction." *Osorio-Lopez*, 2021 WL 1583890, at *5. It

cited several federal cases holding that the trial court cannot simultaneously question a defendant's competence to stand trial and determine, as *Faretta* requires, that he has knowingly and intelligently waived his right to counsel. *Id*., at *6. It ordered a new retrospective competency hearing during which Appellant would be represented by counsel.

ISSUE GRANTED

> Is a trial court presiding over a retrospective competency hearing required to force counsel on an unwilling defendant who is presumed to be competent?

SUMMARY OF THE ARGUMENT

The court of appeals erred in prohibiting any defendant in a retrospective competency hearing from representing themselves. Evidence suggesting incompetence in the past (which triggers the need for a retrospective hearing) should not automatically raise concerns about present capacity to waive legal rights. Defendants in retrospective hearings, like everyone else, are still presumed competent until established otherwise. If a question of present competence arises, the trial court can resolve that question first, permitting the issue of effective waiver of counsel to turn on the usual standard: a knowing, intelligent, and voluntary waiver. That is what happened here, and so the court of appeals's broad ruling should be reversed.

ARGUMENT

1. Clarifying the issue.

The court of appeals erred to hold that there is no self-representation right during a retrospective competency hearing for three reasons. First, that wasn't Appellant's complaint on appeal. While he asserted that self-representation was foreclosed by statute,[5] his constitutional argument centered on the record in his particular case, which in his view showed an inadequate examination into whether Appellant's waiver of counsel was entered competently (despite the stipulation to the expert's report) and knowingly.[6] Second, the court of appeals considered none of the relevant factors to decide applicability of the right—*e.g.*, the text of the constitutional provisions, historical recognition of the right in competency

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[5] Appellant interpreted TEX. CODE CRIM. PROC. art. 46B.006 as requiring counsel at competency hearings, but that article merely says a defendant is "entitled" to counsel; it doesn't mandate counsel. *Compare with* OHIO REV. CODE § 2945.37(D) ("The defendant shall be represented by counsel at the hearing..."). As argued below, whether a particular defendant should be allowed to waive counsel should thus be a matter of determining if the waiver is effective. The court of appeals did not weigh in on the interpretation of 46B.006.

[6] *See* App.'s COA Brief on Competency at 10-13 (phrasing issue as "[t]he trial court abused its discretion by . . . allowing the Defendant to represent himself during [the] proceeding"). The court of appeals also signaled it was departing from Appellant's argument: "[Appellant] points to the record in support of his claim that his purported waiver of the right to counsel failed to satisfy constitutional concerns. Nevertheless, our conclusion that the trial court erred in allowing [Appellant] to represent himself…is not based on any alleged shortcomings in the trial court's admonishments…." *Osorio-Lopez*, 2021 WL 1583890, at *5.

proceedings, and applicability of the *Faretta* rationale to retrospective hearings.[7] Third, having a right to self-representation implies that a defendant could *force* a trial court to let him proceed *pro se*. But this case doesn't present a basis for deciding that issue since the trial court *permitted* Appellant to represent himself. [8]

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[7] Silence from the parties at trial and appeal concerning *Faretta*'s application (to competency hearings generally or retrospective hearings specifically) is another reason this case does not present the issue the court of appeals addressed, *see* TEX. R. APP. P. 33.1, and justifies cursory treatment of the issue here in the margin.

While the correlative right to counsel is likely applicable to competency hearings, *United State v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012); *Villafranco v. State*, ___ S.W.3d ___, PD-0488-20, 2021 WL 4187839, at *5 (Tex. Crim. App. Sept. 15, 2021) (Rule 412 adversarial hearing is a "critical stage" and counsel must be affirmatively waived), the right to self-representation does not "arise[] mechanically" therefrom. *Faretta*, 422 U.S. at 820 n.15. But several arguments favor *Faretta*'s application in this context. The right to self-representation recognized in *Faretta* is a trial right. *Martinez v. Ct. App. of California, Fourth Appellate Dist.*, 528 U.S. 152, 154 (2000). Although Appellant never invoked any particular basis (federal or state constitution or otherwise) to proceed *pro se*, under the Texas Constitution the accused's express "right of being heard by himself" applies "[i]n all criminal prosecutions." TEX. CONST. art. I, § 10. Like the implicit federal constitutional right, it appears in a list of rights tied to trial. Even if not actually a part of trial, *any* Ch. 46B competency hearing is integral to trial itself. It determines whether trial can proceed. TEX. CODE CRIM. PROC. arts. 46B.053, 46B.055. This is arguably true of a retrospective hearing since it makes up for what should have happened at trial.

Other arguments counsel against its application. *Faretta*'s rationale for affirming the dignity of the individual is undermined if the defendant is not actually competent. *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (permitting higher standard for competency to proceed *pro se* at trial and not addressing application to a competency trial). Also, since a retrospective hearing is part of an appeal, it necessarily has similar characteristics as an appeal, for which there is no self-representation right, *Martinez*, 528 U.S. at 162-63. For example, Appellant was no longer presumed innocent; the hearing came about through a process Appellant initiated, rather than at the State's insistence; and its potential outcomes—the conviction will stand or he will require a new trial, *Ex parte Winfrey*, 581 S.W.2d 698, 699 (Tex. Crim. App. 1979)—are appellate remedies.

[8] As a practical matter, it may be difficult for this issue ever to be squarely presented. Few

2. Self-representation should turn on effective waiver of counsel under the facts of each case.

Although the court of appeals wrongly framed the issue as a *right* of self-representation, even when stated differently—*i.e.*, that no trial court can permit a defendant to represent himself at a retrospective competency hearing—the court of appeals still erred. As explained further below, a trial court should decide whether a defendant can represent himself on the usual case-by-case basis—when his waiver of counsel has been found knowing, intelligent, and voluntary.

2.1 Tension between possible incompetence and effective waiver of rights.

The United States Supreme Court has not expressly determined whether it is impossible to waive counsel at a hearing to determine competency, either at the time of trial or retrospectively.[9] *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998). Nonetheless, it is axiomatic that a waiver of legal rights by a person who is presently incompetent is not effective. *Dawson v. State*, 203 S.W.2d 231, 233 (Tex.

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pro se defendants whose competence is in question sufficient to warrant a competency hearing will be able to show that a trial court empowered under *Indiana v. Edwards* to set a higher standard for competency for self-representation nonetheless set it too high and violated *Faretta*.

[9] Neither is there a hard-and-fast rule in the analogous civil-commitment-proceeding context. Acknowledgment of a self-representation right "varies among the states from allowing self-representation as in other suits, to giving the court discretion as to whether waiver and self-representation should proceed, to making the presence of counsel unwaivable." 53 AM. JUR. 2d Mentally Impaired Persons § 35 (citations omitted).

Crim. App. [Comm'n Op.] 1947) ("a person who is insane cannot waive any legal right which he may have."); *Garcia v. State*, 149 S.W.3d 135, 146 (Tex. Crim. App. 2004) (Keller, P.J., concurring) ("incompetency to stand trial cannot be waived because an incompetent person cannot, by definition, *intelligently* waive his rights").

Even before a defendant has been legally declared incompetent, there is tension in saying that a defendant's competence is in doubt and also that he knowingly and intelligently waived legal rights. In rejecting the argument that a possibly incompetent defendant had waived his incompetency issue by failing to request a competency hearing, the United States Supreme Court highlighted this tension: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384 (1966). As it phrased the concern in a later case, "it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing." *Medina v. California*, 505 U.S. 437, 450 (1992).

Due to this concern, several federal courts have required *pro se* defendants to at least accept standby counsel where the questions of competence and effective waiver are simultaneously at issue. In *United States v. Purnett*, the Second Circuit pointed to the same tension: "[l]ogically, the trial court cannot simultaneously

question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." 910 F.2d 51, 55 (2d Cir. 1990). Two other federal cases cited by the court of appeals did the same. *See Ross*, 703 F.3d at 869 (error not to appoint standby counsel at competency hearing even though trial court had found defendant competent to represent himself at an earlier hearing); *United States v. Zedner*, 193 F.3d 562, 566 (2d Cir. 1999) (self-representation was erroneous where there was substantial reason to doubt competence).

2.2 The reasons to require counsel for a competency hearing don't apply here.

These cases do not support the broad rule the court of appeals adopted—not in all competency hearings,[10] and certainly not in retrospective ones. The premise behind the oft-cited tension is absent at a retrospective hearing. There, a defendant's present competency is not at issue[11]—only his past competency. If there has been no

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[10] "In subsequent cases, we clarified that *Purnett* did not create a per se rule that defendants are required under all circumstances to accept counsel at every competency hearing." *Zedner*, 193 F.3d at 565.

[11] Competence may not be required for a *represented* defendant to participate in a retrospective competency hearing. *In re State ex rel. Healey*, WR-82,875-01, 2017 WL 1048121, at *4 (Tex. Crim. App. Mar. 8, 2017) (Keller, P.J., & Yeary, J., dissenting in separate opinions) (not designated for publication); *see also In re Commitment of Fisher*, 164 S.W.3d 637, 654 (Tex. 2005) (no requirement of competency prior to civil sexually violent predator trial). However, it is at the very least prudent, if not required by due process, that a defendant whom the attorneys, expert, and judge suspect to be incompetent be represented. *See Godinez v. Moran*, 509 U.S. 389, 396 (1993) (citing *Johnson v. Zerbst*,

suggestion of present incompetence, there is no reason why a trial court could not determine the effectiveness of a waiver of counsel. Barring self-representation simply because a person's competency should have been inquired into at an earlier time wrongly treats mental illness as a static, permanent feature of a person. *See Edwards,* 554 U.S. at 165 (the nature of mental illness "is not a unitary concept, but varies in degree, [and] can vary over time...."); *Hawkins v. State,* 660 S.W.2d 65, 84 (Tex. Crim. App. 1983) ("competency is not fixed and unalterable over time").

It also ignores what has long been the law in Texas—that, until shown otherwise, each of us is deemed to be of sound mind.[12] Until a court has adjudicated a person incompetent, "[t]here is a rebuttable presumption that a person is mentally competent."[13] TEX. HEALTH & SAFETY CODE § 576.002; *see In re E.L.T.*, 93 S.W.3d

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304 U.S. 458, 468 (1938)); *Ex parte Mines,* 26 S.W.3d 910, 915 (Tex. Crim. App. 2000).

[12] TEX. CODE CRIM. PROC. art. 46B.003(b); *Webb v. State,* 5 Tex. App. 596, 1879 WL 7410, at *6 (Tex. App. 1879) ("every man is presumed to be of sane mind until the contrary is shown"); *Haile v. Holtzclaw*, 414 S.W.2d 916, 925 (Tex. 1967); Title Standards, Joint Editorial Board, Tex. Title Examination Standards, TEX. PROP. CODE, Title 2—Appendix (even when nothing shows that grantor of real property was competent "the universal practice" is presume that fact); *Estate of Riefler*, 540 S.W.3d 626, 635 (Tex. App.—Amarillo 2017, no pet.) ("The law presumes a party to be mentally competent and places the burden of proving incompetence on the party alleging it."). One exception is in probate cases, where there must be proof in some form that the testator was of sound mind. TEX. ESTATES CODE §§ 251.1045 (requirements for self-proved will), 256.152(a)(2)(B) (non-self-proved will); *Beazley v. Denson*, 40 Tex. 416, 430 (1874).

[13] The principle is so carefully guarded that the legislature often repeats it in specific scenarios that may not or should not require setting out. *See* TEX. HEALTH & SAFETY CODE §§ 592.021 (persons with an intellectual disability are presumed competent), 323.004

372, 375 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing presumption in parental termination).

A retrospective hearing does not transport a defendant back to the position they were in before trial, where competence and waiver are simultaneously at issue. While retrospective competency hearings are sometimes called "nunc pro tunc" hearings ("now for then"), the point of the hearing is merely to determine the defendant's competence at a particular historical moment—the time of trial. This is not unlike a jury determining a defendant's sanity at the time of the offense. *See* TEX. PENAL CODE § 8.01. While the ultimate questions of competence at trial and sanity at the time of offense are hugely different, the need for assessing the condition of the defendant's mind at one fixed point in time is similar. And neither warrant treating the defendant sitting in the courtroom with an automatic assumption that the condition persists.

2.3 Competence and effective waiver can be determined sequentially.

Even if present competency is an issue (as Appellant's defense counsel suggested before his retrospective hearing), this fact is not a hurdle like it can be in

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(facilities conducting forensic rape exams "shall presume that an adult sexual assault survivor requesting a forensic medical examination and treatment is competent."). And it is true even where a court is presented substantial evidence that a person may be incapacitated and requires the immediate appointment of a guardian: the person "may not be presumed to be incapacitated." TEX. ESTATES CODE § 1251.002.

typical competency hearing. Cases cited by the court of appeals recognize that the potential problem is proceeding with self-representation *before* the question of competency to stand trial is resolved. *Klat*, 156 F.3d at 1263; *Purnett*, 910 F.2d at 56. Even in a traditional competency hearing setting, federal courts have refused to require the appointment of counsel when a trial court has first made a fair determination of the defendant's competency (often based on psychiatric reports and the court's own observation) and a second inquiry into competency when the defendant proceeded *pro se* was merely a precautionary measure. *See, e.g*., *Porter v. Attorney Gen.*, 552 F.3d 1260, 1269 (11th Cir. 2008), *rev'd on other grounds by Porter v. McCollum*, 558 U.S. 30 (2009); *United States v. Morrison*, 153 F.3d 34, 47 (2d Cir. 1998). Resolving the issues of competence and effective waiver of rights in that ideal sequence is easily possible in a retrospective hearing.

Even when present competence is not proactively inquired into, trial courts should be able to adopt a wait-and-see approach, ready to revoke permission to proceed *pro se* at the retrospective hearing, if the need arises. *See Faretta*, 422 U.S. at 834 n.46 (recognizing termination of self-representation may be necessary). Forbidding a trial court from ever allowing self-representation impedes on the court's discretion to respect the self-determination and autonomy of individuals the trial court believes are presently (and presumptively) competent. *See Martinez*, 528

U.S. at 163 (even when there is no constitutional right to self-representation on appeal, "Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*."); *see also Thomas v. State*, 286 S.W.3d 109, 113 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("There is no such rule [against self-representation]. Courts have discretion to allow pro se representation on appeal.").

Competence to waive the right to counsel is not *required* to be any greater than the *Dusky v. United States*[14] competency-to-stand-trial standard. *Moran*, 509 at 398-99. "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id*. The federal constitution requires only that a defendant's waiver of counsel be made intelligently, knowingly, and voluntarily. *Id.* at 400; *Zerbst*, 304 U.S. at 465 ("The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."). And while states can require a higher standard to exercise the right of self-representation, *Edwards*, 554 U.S. at 174, Texas has not codified a higher standard. Instead, the matter of effective waiver is properly left to the discretion of the trial court. *Chadwick v. State*, 309 S.W.3d 558, 563 (Tex. Crim.

[14] 362 U.S. 402, 402 (1960).

App. 2010) ("the trial judge is in the best position to make the decision of whether a mentally ill defendant is competent to proceed *pro se*.") (citing *Edwards*, 554 U.S. at 177).

3. No abuse of discretion to find Appellant had capacity to waive counsel.

As in all cases, the mere fact that there was reason to grant a retrospective hearing did not preclude Appellant's competence to waive counsel at that hearing. And here, it was no abuse of discretion for the trial court to find Appellant's waiver of counsel was effective. After an issue of Appellant's present competence was raised by defense counsel, the trial court entered two orders to have Appellant evaluated. 5th Supp. CR 21, 22. One of these orders stated, "the Court is of the opinion that there is evidence to support a finding of incompetency." 5th Supp. CR 22. Thereafter, the same expert who had found Appellant incompetent in 2018 before trial opined that he was then competent. 5th Supp. CR 4-7. While no formal competency hearing or findings from the trial court appear in the record, at the beginning of the retrospective hearing, the prosecutor asserted "we have agreed to stipulate to the doctor's report …that found [Appellant] competent to proceed in this competency trial" and asked the trial court to take judicial notice of the files. Retro-RR at 6-7. Even if this procedure varied from the requirements of Art. 46B.005, it seems doubtful from the plain language of a chapter dedicated to determining competency *to stand trial* that such requirements apply to a suggestion of

incompetence for a retrospective competency hearing. *See, e.g.*, TEX. CODE CRIM. PROC. arts. 46B.003-46B.005. In any case, the hearing does not suggest Appellant was acting bizarrely or saying irrational things, even if his statements or questions were not carefully articulated or precisely on-point.

4. Conclusion

The only issue the court of appeals ought to have decided was whether it was within the zone of reasonable disagreement for the trial court to have found Appellant's waiver of counsel effective. This Court should reject the court of appeals's absolutist position that no retrospective-competency-hearing defendant could represent himself. Any questions about whether Appellant was adequately informed about what he was waiving (aside from questions about capacity) should be determined by the court of appeals on remand.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the court of appeals, and remand for a consideration of the adequacy of the trial court's admonishments regarding the waiver of counsel and Appellant's remaining issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 4,234 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 15th day of October 2021, the State's Brief on the Merits was served electronically on the parties below.

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